IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

TUESDAY, THE 20TH MARCH 2007 / 29TH PHALGUNA 1928

WP(C).No. 21005 of 2003(A)

PETITIONER:

ZEENATH GARMENTS, UNEEN TOWER
KOTTAKAL, MALAPPURAM REPRESENTED BY
ITS MANAGING PARTNER, SRI.ABOOBACKER HAJEE.

BY ADV. SRI.P.GOPINATH
SRI.HARRIS BEERAN

RESPONDENT:

ASST.PROVIDENT FUND COMMISSIONER,
EMPLOYEES' PROVIDENT FUND ORGANISATION
SUB-REGIONAL OFFICE, P.B.NO.1806, ERNAHIPALAM,
CALICUT.

BY ADV. SRI.R.SUDHIR, SC, P.F.
SRI.THOMAS MATHEW NELLIMOOTTIL,SC, P.F.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C)21005/03

ORDER ON I.A.7908/2003 IN W.P.(C)NO.21005/03
DISMISSED

20.03.2007. SD/- S. SIRI JAGAN, JUDGE.

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF THE PARTNERSHIP DEED DATED 15.3.1996 EXECYTED BETWEEN THE PARTNERS.

EXT.P2: TRUE COPY OF THE PANCHAYAT LICENCE ISSUED TO THE PETITIONER FOR THE PERIOD UPTO 31.3.2001.

EXT.P3: TRUE COPY OF THE REGISTRATION CERTIFICATE ISSUED TO THE PETITIONER UNDER THE CENTRAL SALES TAX ACT.

EXT.P4: TRUE COPY OF THE REGISTRATION CERTIFICATE ISSUED TO THE PETITIONER UNDER THE KERALA GENERAL SALES TAX ACT.

EXT.P5: TRUE COPY OF THE CHART SHOWING THE DETAILS OF THE EMPLOYEES WHO HAVE WORKED WITH THE PETITIONER SINCE ITS INCORPORATION IN 1996.

EXT.P6: TRUE COPY OF THE CHART SHOWING THE DETAILS OF THE EMPLOYEES WHO HAVE WORKED WITH THE PETITIONER SINCE ITS INCORPORATION IN 1996.

EXT.P7: TRUE COPY OF THIS ORDER DATED 1.5.03 ISSUED BY THE RESPONDENT.

RESPONDENT'S EXHIBITS

EXT.R1(A): TRUE COPY OF DEPOSITIONS OF SRI. ABDURAHIMAN IN CROSS EXAMINATION BY ENFORCEMENT OFFICER.

EXT.R1(B): TRUE COPY OF TRADING AND PROFIT AND LOSS ACCOUNT AND BALANCE SHEET OF ZEENATH GARMENTS.

EXT.R1(C): TRUE COPY OF TRADING AND PROFIT AND LOSS ACCOUNT AND BALANCE SHEET OF ZEENATH TEXTILES.

EXT.R1(D): TRUE COPY OF DEPOSITIONS OF SRI. ABDURAHIMAN IN CHIEF EXAMINATION.

EXT.R1(E): TRUE COPY OF LETTER PAD OF M/S. ZEENATH TEXTILES.

EXT.R1(F): TRUE COPY OF LETTER PAD OF M/S. ZEENATH GARMENTS.

/TRUE COPY/

PA TO JUDGE.

S. SIRI JAGAN, J.

W.P.(C)NO. 21005 OF 2003

DATED THIS THE 20th DAY OF MARCH, 2007

JUDGMENT

The petitioner is a partnership firm engaged in the business of sale of ready made garments in the 1st floor of a building leased by them in the name and style of Zeenath Garments. The firm consists of the following partners.

" 1. M. Aboobacker Hajee, S/o. Ahammed Hajee, (Managing Partner).
2. P. Abdul Nazer, S/o. Moideen Hajee.
3. M. Abdul Gafoor, S/o. Muhammed Hajee.
4. M. Shameer Abdul Rahman, S/o. Abdul Rahman Hajee."

2. There is another firm running another business in the ground floor of the same building also on lease owner of the building being the same in the name and style of Zeenath Textiles. That partnership firm consists of the following partners.

" a) Abdurahiman Hajee (Managing Partner)

b) M. Abdurahiman Hajee.

c) M. Abdul Salam

d) P. Abdul Shukoor "

3. The respondent- Assistant Provident Fund Commissioner

issued notice to the petitioner for clubbing these two establishments together for the purpose of coverage under the Employees' Provident Funds and Miscellaneous Provisions Act. After taking evidence, ultimately the respondent passed Ext.P6 order holding that there is functional integrality between the two establishments and therefore these two establishments are liable to be clubbed together for the purpose of coverage under the Employees' Provident Fund and Miscellaneous Provisions Act. Ext.P6 order is under challenge in this writ petition. At the outset, the learned counsel for the petitioner was asked as to why he did not file an appeal before the Appellate Tribunal. He pointed out that in Ground C, he has specifically stated as to why he could not file an appeal, the reason being that at the relevant time the Tribunal was not sitting on account of certain enquiries pending against the Presiding Officer of the Tribunal. The learned counsel also submits that the writ petition was filed in 2003 and at this point of time, the petitioner would also not be able to file an appeal because the period of limitation prescribed for filing the appeal is long over. I find that Ext.P6 order was passed on 1.5.03 and the petitioner has filed this writ petition on 30.6.03. The petitioner would have received the order only subsequent to 1.5.03 and therefore it is clear that this original petition has been filed within the period of limitation prescribed for filing an appeal. In such circumstances, I

feel that it would not be in the interest of justice to relegate the petitioner to the alternate remedy by way of filing an appeal to the Tribunal. Therefore, I am inclined to consider this case on merits.

4. The learned counsel for the petitioner submits that the reasons mentioned in Ext.P6 for arriving at the conclusion that there is functional integrality between the two firms is palpably inadequate for such a finding. He points out that apart from the finding that the partners of the two firms are closely related and that both the firms are using the same staircase for access to their establishments, there is absolutely no material on record to enter a finding of functional integrality. He therefore seeks quashing of Ext.P6 order holding that the two establishments are not liable to be clubbed together and declaring that the petitioner's establishment is not liable to be covered under the Act.

5. Learned counsel for the Provident Fund Organisation strongly disputes the contentions of the petitioner. He points out that the Enforcement Officer, who has visited the establishments, has found that there was only one name board mentioning "Zeenath", and no other name board was found in both the establishments. He would submit that the fact that both the establishments are using a common staircase, which starts from the inside of the ground floor would show that once the establishment in the ground floor is closed there would not be any access to the 1st

floor which would mean that on closure of the establishment in the ground floor, the other would also have to be automatically closed down, which is a test to hold that one establishment is functionally dependant on the other.

6. I have considered the rival contentions in detail. The reasons stated by the respondent in Ext.P6 for arriving at the conclusion that there is functional integralilty between the two establishments are as follows:

> After a lengthy analysis of factual circumstance and also going through chief Examination of petitioner Shri. Abdurahiman Haji, Managing Partner by Advocate as Exhibit-P.18 and cross Examination of Shri. Abdurahiman Haji, by Enforcement Officer as Exhibit.P19 the following facts are established.
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> 1. Though it cannot be said that the partners of the firm Zeenath Textiles are same as of Zeenath Garments the partners of the two firms are close relatives.
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> 2. The Managing partner of Zeenath Textiles M. Abdurahiman Haji and partner of Zeenath Garments M. Abdul Gafoor are sons of Shri,. Mohammed Haji.
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> 3. Shri. M. Abdul Salam, Partner, Zeenath Textiles is son of M. Aboobacker Haji, Managing Partner of Zeenath Garments.
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> 4. Shri. Shamer Abdul Rahiman, Partner of Zeenath Garments is son of Shri. M. Abdurahiman Haji.
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> 5. it was also established that there is no access to M/s. Zeenath Garments in

> First Floor through the staircase in the North Esternmost side of the building, which cannot be utilized, as the passage to this staircase connecting the road is completely closed due to construction of another building is also agreed by Shri. Abdurahiman Haji, Managing Partner (Question and Answer number 22 to 25 of Exhibit P-19) more over access to Zeenath Garments through Western side is denied due to closed wall on that side (Question and answer number 34 of Exhibit P19). The only staircase to Zeenath Garments starts from inside of Zeenath Textiles showroom and the entrance to Zeenath Garments in 1st floor is without any interlocking facility and such staircase is built only in easternmost side of the "U" shaped building and not on western side of the building (Question and Answer Number 40 to 50, Question and Answer number 81 in Exhibit P.19). This reveals that once the shutter of M/s. Zeenath Textiles is closed there is no further access to M/s. Zeenath Garments at I Floor.
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> 6. Initially from 03/1996 to 03/1998 Zeenath Garments and Zeenath Textiles had only one power connection and the electricity charges were paid only by Zeenath Textiles (As observed in Exhibit P-10 and Exhibit P-17.)"

7. From the same, evidently it is clear that he has not relied upon the report of the Enforcement Officer that there is only one name board mentioning 'Zeenath' for both the establishments. Admittedly there are two separate establishments by name 'Zeenath Garments' and 'Zeenath Textiles', which is not in dispute. Now as far as first four reasons are concerned, there cannot be any

doubt that those by themselves are not reasons for holding that there is functional integrality between the two establishments. It is also settled law now that common ownership even would not lead to an automatic inference of functional integrality. Therefore it has to be examined as to whether those reasons coupled with the other two reasons would lead to such a conclusion.

8. Admittedly, the building is not owned by either of the two establishments. The two establishments have separate lease deeds in respect of their respective portion of the building. They have separate registrations, licences, accounts etc and the respondent has not pointed out any other thing common to both. There is also no allegation of transfer of employees or financial inter dependence. Of course, it is true that the petitioner is using a staircase for access to their establishment which starts from inside of the establishment on the ground floor and therefore if the ground floor is closed, the petitioner would not get access to the first floor. I am of opinion that this is not what is contemplated by the test of functional integrality to see whether on closure of one, the other would also automatically close down. That test should itself be relating to the functional integrality between the two establishments meaning thereby that the business itself must be inter-dependant on each other and not merely the physical access to the two establishments. When the two persons, who are conducting the two

separate business of their own, joins together to take on rent two floors of the same building which have only one staircase that too starting from inside the shutter of the ground floor, it cannot be stated that, that amounts to a presumption of automatic closure of the one when the shutter of the other is downed. This is all the more so since as observed by the respondent himself in Ext.P6, the situation arose because passage to the staircase connecting the road was completely closed due to the construction of another building apparently by the owner of the building. As such I am of opinion that the mere fact that the common stair case starts from the inside of the ground floor is not at all a factor much less a determining factor to presume functional integrality between the two establishments.

9. The 6th ground also does not appear to be supportive of the conclusion of the respondent. Admittedly the building does not belong to the petitioner or the other establishment. If the owner has provided only one power connection and the electricity charges are paid by one that does not essentially lead to a conclusion of functional integrality between the two. It is perfectly open to the two establishments to share the electricity charges.

In the above circumstances, I am satisfied that going by the reasons mentioned in Ext.P6, no conclusion of functional integrality can be arrived at on the basis of the dictum laid down in the various

decisions of the Supreme Court and this Court. Therefore I am satisfied that the reasons mentioned in Ext.P6 are not sufficient to come to a conclusion that there is functional integrality between the two establishments. Resultantly the clubbing of the establishments together for the purpose coverage under the Act is without justification. Since the respondent has no case that without clubbing together the petitioner's establishment is liable to be covered separately, the petitioner's establishment is not liable to be covered under the Act. Therefore, I am satisfied that Ext.P6 order has been passed on extraneous considerations and therefore is liable to be set aside. I do so, but without any order as to costs.

S. SIRI JAGAN, JUDGE

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